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ABSTRACT

This paper examines how the U.S. Privacy Protection Commission functioned. Examined are its basic authority, procedures and policies, operational plan, distinctive features, staffing, and results of recommendations. Created by an act of Congress in 1974, the Commission was authorized to examine all actual and potential invasions of privacy in the private and public sectors. The group was staffed with social scientists with strong research backgrounds. The Commission was granted subpoena power, which, although it was only used a few times, undoubtedly encouraged prompt cooperation from those whom the Commission sought to involve. All investigations were based on the hearings process. This, coupled with the policy of inviting as witnesses the chief executive officers of the organization under investigation rather than lower ranking officials assured the Commission of the highest quality of hard data. The Commission's final report contained 162 recommendations on consumer credit, the depository relationship, mailing lists, insurance records, employment records, medical care records, investigative reporting, government access to records, education records, government assistance (welfare), the role of the states, the Privacy Act, income tax administration, research and statistics, and the Social Security number. An immediate reaction following the report was the introduction in Congress of some 200 bills incorporating the recommendations. This is especially noteworthy inasmuch as only one half of all commissions have any legislation introduced at all. Several of the bills passed. In addition, hundreds of public and private groups also implemented the recommendations voluntarily. (Author/RM)

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# THE U. S. PRIVACY PROTECTION COMMISSION

## --- A Retrospective View From the Chair ---

by

David F. Linowes

Paper presented at [illegible] Conference noted on SO System 6 letter.

## INTRODUCTION

Some writers view the function of presidential and/or congressional ad hoc commissions as being part of an incremental policy process.[1] This approach is based on the concept that public policy changes occur in small increments, rather than through radical reform programs. The incremental development of policy, they argue, is an evolutionary process, thereby minimizing the threat of social upheaval. Others take a stronger position by asserting that commissions are created for the direct purpose of formulating policy and aiding its adoption.[2] The mandate and function of the United States Privacy Protection Study Commission (PPSC) combined both approaches.

## BASIC AUTHORITY

The Privacy Commission was created by the Privacy Act of 1974 to make a "study of the data banks, automatic data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information." We also were directed to set forth recommendations regarding the application of the principles of the Privacy Act of 1974 and "to make such other legislative recommendations as the Commission deems necessary to protect the privacy of individuals . . ."[3]

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As with just about all commissions, the Act mandates that policy analysis be a primary goal, along with making appropriate legislative recommendations. Although Wolanin's[4] study indicates that only about half of all commissions fulfill their stated goals of policy analysis, I believe it is fair to say that the PPSC was one of those that did.

Congress further specifically directed us to analyze the broader privacy rights issue, study current attempts to solve it (such as the Fair Credit Reporting Act and the Privacy Act of 1974), and present proposals for legislation where appropriate.[5] Our 654-page report was the result of our efforts.[6]

That report, coupled with extensive public hearings held in various parts of the country served another vital function. It helped educate the public by calling attention to the problem, and in building support for the recommended solutions.

The PPSC formally came into existence on June 10, 1975. Three of the members were appointed by the President, two by the President of the Senate, and two by the Speaker of the House of Representatives. The members were: William O. Bailey, President, Aetna Life & Casualty Company; William B. Dickinson, retired Managing Editor of the Philadelphia Evening Bulletin; Representative Barry M. Goldwater, Jr., of California, a former stockbroker; Representative Edward I. Koch, a former practicing attorney and now Mayor of New York City; State Senator Robert J. Tennessen of Minnesota, sponsor of the State of Minnesota Fair Information Practices Act and a practicing attorney; Dr. Willis H. Ware, member of the Corporate Research Staff of Rand Corporation; and myself. I was appointed by President Gerald R. Ford and was asked to serve as its Chairman.

The act required that in our study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations we were to determine the standards and procedures now in force. In analyzing the standards and procedures, we were to include the criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information.

Our report to the President and the Congress, among other things, specifically was to advise whether a person who maintains a mailing list should be required to remove the name and address of any individual who does not want to be on it; whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other Federal agencies and to agencies of State governments; whether an individual who has been harmed as a consequence of a willful or intentional violation of the Privacy Act of 1974 should be able to sue the Federal Government for general damages; whether the standards for security and confidentiality of records that the Privacy Act required Federal agencies to adopt should be applied when a record is disclosed to a person other than an agency; and whether governmental and private information systems affect Federal-State relations and the principle of separation of powers.

Based on our findings, we were to recommend to the President and the Congress the extent, if any, to which the principles and requirements of the Privacy Act of 1974 should be applied by legislation, administrative action, or voluntary adoption to the recordkeeping practices of organizations not now subject to them. We were also to report on such other legislative recommendations as the Commission might determine to be necessary to protect the privacy of the individuals while meeting the legitimate needs of government and society for information.

The Commission was empowered to hold hearings, to swear witnesses, and to compel the production of testimony and other documents and information that it deemed pertinent to the fulfillment of its mandate. Moreover, we were directed to determine what laws, Executive orders, regulations, directives, and judicial decisions governed the activities under study, as well as the extent to which they are consistent with the rights of privacy, due process, and other guarantees in the Constitution. In all our work, we were advised to collect and use findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and privacy bodies, institutions, organizations, and individuals that pertained to the problems under study.

PROCEDURES AND POLICIES

To fulfill our broad and complex mandate, we concentrated on five principal goals. First, we sought to foster public awareness of privacy protection issues and of the fair information practice principles established by the Privacy Act of 1974. Second, we aimed to influence the way in which privacy protection issues were being conceived and addressed. Third, we wanted to acquire and promote an accurate understanding of current practices with respect to the collection, use, and dissemination of recorded information about individuals and of the dangers and protections for personal privacy that are inherent in those practices. Fourth, we sought to assess the degree to which the fair information practice principles established by the Privacy Act of 1974 were being adhered to in practice. Finally, we expected to make recommendations that would promote a fair balance between the personal privacy interests of the individual on the one hand, and institutional and societal needs for information on the other.

The Commission realized that we would have to examine a range of recordkeeping practices in a variety of institutional settings. We also realized that while our analysis and recommendations were of primary importance, we would fail to meet our responsibilities if we did not provide a well-documented public record that contained accurate and useful descriptive information about current recordkeeping practices and the way in which records were used in making decisions about individuals.

We recognized that to assess the applicability of the principles and requirements of the Privacy Act of 1974 to organizations not covered required an examination of the Federal experience, as well as an examination of alternative methods of privacy protection techniques at different levels of government and in the private sector. Fair information practice principles, we recognized, are always applied in context, and this had to be taken into account at every stage.

We examined Federal and State laws and legislative proposals other than the Privacy Act of 1974 whose objectives or results were the protection of personal privacy. We had to weigh competing cultural, social, and political values, such as equality of opportunity, efficiency, and freedom of information, as well as the impact of privacy protection safeguards on the basic institutional structure of the society. And, we had to probe technological, economic and social trends that might determine the environment in which any recommendations we made would be implemented.

## OPERATIONAL PLAN

To achieve these many objectives, we adopted a highly structured program; a research strategy; a project management system; and a phased timetable.

The activities of the Commission were organized into three sets of related programs. The first of these, called the Recordkeeping Practices Assessment Program, focused on the personal-data recordkeeping policies and practices of specific types of organizations and on the statutory and regulatory arrangements that shaped them. The fourteen projects in the program included the areas specifically suggested to the Commission in the Privacy Act as well as two of the special required inquiries, mailing lists and IRS disclosure policy.

The second program, called the Cross-Cutting Issues Program, consisted of analytical projects focused on information policy questions that ranged across the spectrum of practices with which the Commission was concerned in the first program described above. Included among them were studies that would lead to reports on the disclosure of Federal agency records to entities not subject to the Privacy Act of 1974; the general damages question; and the impact of information systems on Federal-State relations and the separation of powers. Because the Practices Assessment and Cross-Cutting Issues Programs were composed of projects that would result in Commission recommendations, we devoted most of our resources to them.

The third program, called the Trend Assessments Program, was mainly concerned with trends that would influence the uses that organizations make of records about individuals in the future. In addition, a modest effort was also made to explore through this process topics that were not covered in the Practices Assessment and Cross-Cutting Issues Programs.

We chose a research strategy that relied heavily on well-staffed hearings and workshops. The hearings and workshops were the principal means of broadening public understanding of the issues facing the Commission and of enlisting the assistance of recordkeeping organizations, Congressional

committees, and interested industrial, professional, and public interest groups.

The Commission also chose to follow a project management system that allowed assignment of each study to a small full-time professional staff of project managers working in tandem with a small central legal staff. This core staff was complemented by part-time consultants and research assistants working on parts of projects, and by outside expert advisors.

Our timetable called for a six-month program planning and development phase; a twelve-month operations phase for information gathering, analysis, and validation; a three-month synthesis phase; and a three-month close-out phase for final editing and reproduction of the final report.

Frank Popper recommends that some commissions should have no deadlines, similar to royal commissions; at the very minimum, commissions should have at least two years to report.[7] Although Popper claims deadlines "hinder the performance of competent, pertinent research, . . . hinder the recruitment of good staff members,"[8] and rush the writing of the report, the determination to finish the work of the Privacy Commission within the original two year period helped to avoid needless delays. It might be noted that the Privacy Commission's deadline of two years was longer than the average commission's duration of 11.6 months.[9]

In carrying out our responsibilities, we conducted research work and held public hearings in the following areas: mailing list industry; health and medical records; credit grantors, credit cards, credit reporting and credit investigations; employee and personnel records; banking industry; education; welfare records and other records kept by social service agencies; the recordkeeping practices of the insurance industry; and the use of the Social Security number as a universal identifier.

The testimony in our hearings both raised and answered several questions. In connection with mailing lists, for example, one concern of the Commission was whether such lists were being used to identify individuals for purposes other than direct mail marketing. We obtained testimony that the Internal Revenue Service had acquired lists from commercial list compilers to use for verification of whether persons had filed tax returns. We learned that certain agencies of government such as the Federal Bureau of Investigation had obtained lists for law enforcement purposes. These uses indicated that lists of the private sector were being used not only for the marketing of products and services, but also for particular governmental purposes.

One important question that we had to ask was, "If an agency of government has ready access to lists of individuals developed and stored by private organizations, is it logical to have different standards of behavior for a government agency from that of a private organization?"

The danger of being able to identify individuals from lists of all types has become abundantly clear in recent years. We have seen where authorities have been able to control large masses of the population by obtaining lists which identify particular individuals by occupation, race, religion, political preferences, social status, and other factors. The testimony that we heard did not indicate that those abuses were then widely and abusively practices. However, the danger of abuses was very much present.

We were further concerned that individuals who undertake some normal everyday action, such as subscribing to a magazine, be fully aware of the almost automatic follow on of their acts. In other words, does a person who subscribes to a magazine or who buys a shirt through the mail understand

that the probable result of such an act will be the placing of his name on lists for other solicitations as well as for other purposes? The probable further result of such an act may be that the nature of the magazine or book or organization will be entered into a data bank to be matched with other publicly or privately available data to create a profile about the person. This profile helps identify him along with others of similar profile for any purpose a person may have in mind.

Another key question we had to answer was not whether social and business organizations have a legitimate need for information, but how much information they need in order to make wise decisions.

We asked all organizations to look at the information they required and to ask themselves whether all of it is absolutely necessary. If it were not necessary, why go to the expense of collecting and maintaining such an elaborate recordkeeping system?

Another area the Commission had to deal with was what was made of the information collected by the social and business organizations and those to whom they furnished information. What were the recordkeeping practices? When information was transferred from one organization to another -- and then on to another -- and back and forth -- who is accountable? What responsibility should attach to whomever is responsible?

DISTINCTIVE FEATURES

The Privacy Commission had several features, embodying a number of characteristics recommended by students of commissions for effective performance.

Compared to most commissions, the size of the Privacy Commission was relatively small, thus encouraging more unified, energetic, and efficient

work by the commissioners. The Privacy Commission's seven members falls well below the average of 13.3 commissioners noted in Wolanin's study of commissions from 1945 to 1972.[10] According to Wolanin, the trend of appointing larger and larger commissions could be an effort to satisfy requests for equal representation by varied constituencies.[11] With the growth in size, Alan L. Dean notes, the "problems of commission selection and operations have consequently become more difficult."[12] In addition, "members of small commissions usually take their assignment most seriously and tend to assume greater personal responsibility for the quality of work performed."[13] Popper also concludes that smaller commissions "meet more often, work harder, work out their differences most constructively, and produce a report more rapidly . . . (In short), commissions should be as small as possible."[14]

Unlike most, the Privacy Commission was created by an act of Congress.[15] Only 9% of all commissions from 1945 to 1972 have been established by statute,[16] the remaining commissions were created by Presidential Order or Announcement.

Congress granted our Commission both specific and complex, far-reaching mandates. For example, we were required to examine actual and potential abuses to personal privacy in the private and public sectors, but the Act never defined "privacy" and no generally accepted definition exists.

The list of topics required to be studied by the Privacy Commission covered a broad range of public-policy issue areas. Among the subjects investigated both through hearings and other research means were aspects of education, welfare, health, consumer credit, employment, and financial policy, as well as areas of government surveillance and intrusions into the private lives of citizens. The information privacy focus adopted by the

Commission stands at the cutting edge of the issues in many of these policy areas. Pivotal decisions made by organizations often turn on the nature and manner of personal information collected about prospective clients, a fact increasingly appreciated by the public. Therefore, we examined in detail the informational needs, procedures and uses of a wide variety of vital public and private organizations.

STAFFING

In staffing the Commission we carefully reviewed the education, training and other qualifications of the Commission members themselves, and related this analysis to our responsibilities under the Act. This exercise revealed that it would be essential that the senior professional staff persons be trained in social science research. We further recognized that in view of the nature of the areas in which we were to probe, it would be desirable that the staff not be dominated by lawyers, as is so often the case in temporary commissions.

Amitai Etzioni comments on the relationship of lawyers and social scientists in a commission: Social scientific "methods of obtaining data are rendered ineffectual because usually the lawyers staff-directors have little of the background needed to work with social scientists, and above all because everyone is in a rush . . . The facilities and methods under which commissions work would have to be modified if social scientists were to effectively supplement lawyers. Most (commissions) are set up to investigate and build concensus but not to conduct research."[17]

In our work, we actively sought for the post of Executive Director a person trained in one of the social sciences, preferably a political scientist with a strong research background. Administrative experience was not necessary inasmuch as the Chairman's professional training and experience was essentially in the management field.

With that in mind after interviewing some forty applicants, we selected for the post of Executive Director a woman with political science research credentials in government, but with no administrative experience.

For Director of Research and Deputy Executive Director, we selected a political scientist with an extensive academic background. Our General Counsel was a young man who had just opened his law office and had worked in the public interest law field. They were directed to seek out other professional staff with social science backgrounds, strong in research. Of the 27 senior professional staff only 4 performed in legal capacities. Of the 45 other professionals, none were lawyers.

The projects were researched independently with separate staffs. Common themes and principles applied throughout, but style, pacing and techniques differed. Because of the varied agenda, a multiplicity of contacts with parties inside and outside of government were required.

As a commission of the "mixed" type, the Privacy Commission occupied an unusual position between the Congress and the Presidency. Four commissioners were appointed by the Legislative Branch and three by the Executive Branch. The staff were drawn from Executive Branch agencies, Congressional staff, as well as from academia and the private sector. Our relationships with the representatives of the two branches of the Federal Government were unique opportunities to observe Congress-Executive branch interactions. Establishing the appropriate level and quality of liaison with members of each of the branches was an important consideration.

Congress granted us the subpoena power to facilitate information gathering, and authorized Federal agencies to furnish such information as we might request. The formal use of the subpoena power was required only three times, once merely to respect company policy.

This limited use of the subpoena supports the observation of Alan L. Dean in that, "subpoena powers are rarely used by ad hoc commissions charged with formulating policy proposals even when granted."[18]

We were empowered to appoint an executive director and to delegate functions to a staff, consultants, and/or contractors. The staff basically was comprised of five senior officers, nine project managers and fifty-eight other professionals, including full-time and temporary staff as well as short-term consultants. The tenure and level of contribution of the professionals varied considerably. Day-to-day administration, research and writing duties fell to the staff, under the weekly policy direction of the Chairman.

The public hearing vehicle as our major research tool was supplemented with in-house studies. Most students of commissions emphasize the role of hearings in generating publicity and in establishing the commission's independence, fairness, and thoroughness. However, we found the public hearings process extremely valuable as an information-gathering device, as well as for involving commissioners and staff into on-going working relationships with those organizations whose recordkeeping systems we were investigating.

The staff was directed to conduct some original research work. As in the case with most commissions, the extent of social science research was limited.

Wolanin[19] lists many reasons why he believes commissions do not make full use of social scientific research. For instance, commissions are limited by time and budget constraints, thus making extensive research impractical. The commission's mandate is often a broad assessment of an issue, composed of many confusing, overlapping, and complex variables.

Perhaps the most influential factor is the presence of so many lawyers and bureaucrats from the Federal government. The lawyers tend to overshadow the social scientists, and thus the fact-finding devices employed are usually public hearings and testimonies rather than scientific surveys or experiments. No outside consulting institutions were engaged, although many made proposals to us.

The decision to rely largely on public hearings, traditionally the province of lawyers and legislators, should be noted, given the high number of especially selected social scientists on the professional staff. In 34 days of hearings, we received testimony from over 350 witnesses including representatives of the Senate, the House of Representatives, the Executive branch, State and local government, private enterprise, public interest groups, and the public-at-large. Our staff members visited many Federal agencies for briefings, and we sponsored a major workshop on privacy issues confronting the states.

RESULTS

The Commission's final report, Personal Privacy in an Information Society[20], is a 654-page volume containing 162 recommendations. The chapters, which parallel the Commission's original procedural plan and hearings program, included consumer credit, the depository relationship, mailing lists, insurance records, employment records, medical care records, investigative reporting, government access to records, education records, government assistance (welfare), the role of the states, the Privacy Act, income tax administration, research and statistics, and the Social Security number. Appendices on state privacy laws, tax-paying records, employment records, the Privacy Act, and the relationship between technology and privacy were published separately. These briefer volumes supplied background and supplemental findings in the respective subject areas.

An immediate reaction following our report was the introduction in Congress of some 200 bills incorporating our recommendations. This is especially noteworthy inasmuch as only one-half of all commissions have any legislation introduced at all.[21] In addition, several of these bills passed. In the Executive branch, after a discussion session with the President, a cabinet-level committee was appointed to study our recommendations and take appropriate actions. Hundreds of public and private organizations responded promptly -- many implementing our recommendations voluntarily.

GOVERNMENT ACTION

Following the deliberations of the cabinet-level committee, the President established an inter-agency Task Force to evaluate our proposals in more detail, and to make supplemental recommendations if necessary. This Task Force was co-chaired by the President's Domestic Policy Staff and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce, and it developed the President's Privacy Initiative which helped stimulate the following congressional action.

In October, 1978, the Right to Financial Privacy Act of 1978 was passed with strong Administration support. The Act sets limits on Federal government access to individual information held by banks and credit card issuers.

In April, 1979, the President sent three privacy bills to the Congress covering medical records, research records, and government access to news media files. The proposed legislation on medical and research records extends to those records the limits on government access established in the Right to Financial Privacy Act of 1978. Hearings on the Privacy and Medical Information Act were completed in 1980 and action is expected in 1981. The Privacy of Research Records Act was deferred to 1981.

In October, 1979, the President submitted two bills to Congress: the Fair Financial Information Practices Act and the Privacy of Electronic Fund Transfers Act. Action on the Privacy of Electronic Funds Transfer Act covering electronic banking was deferred to 1981. Hearings on the Fair Financial Information Practices Act covering consumer reporting agencies, credit grantors, credit and check authorization services, depository institutions, and insurance companies were completed in 1980 and action is expected in 1981.

## CONCLUSION

The report and recommendations of the PPSC were well-received not only in this country but abroad. Several other nations are using our findings in the drafting of their own legislation, or in amending laws and regulations already in effect. Many states in this country are using our report as the basis for their actions.

On reflection, several elements stand out as important contributors to the relative success of the Commission.

The creation of the Privacy Protection Commission was initiated by Congress, not by the President, as is generally the case.[22] As a result, there was widespread interest and support for our work. We were granted subpoena power, and although as indicated above was used only a few times, the presence of this authority undoubtedly encouraged prompt cooperation from those whom we sought to involve.

Although the Act setting up the Commission contained specific items for us to investigate, our authority was very broad, authorizing us to examine all actual and potential invasions of privacy in the private and public sectors. The only exception was that of religion. Although this broad mandate seemed a burden at the outset, as the work proceeded, it proved

helpful. On a number of occasions the authority vested in the Chairman by the Act itself was an important element for making it possible to move the activities of the Commission and staff forward expeditiously. Although the original Act had some restrictions on the use of the funds, at our request it was modified by Congress. Funding was ample. Congress always responded cooperatively to our needs.

The principle of seeking out social scientists with strong research backgrounds for our staff, and the openness and objectivity with which the procedures of staff selection were carried out, were significant in achieving the relatively high quality of our end product. Undoubtedly, the decision made early to base our investigations on the hearings process proved to be the correct one. This, coupled with the policy of inviting as witnesses the chief executive officers of the organizations we were investigating rather than lower-ranking officials, assured us of the highest quality of hard data. We did, however, often permit substitutions of other senior executives, in a spirit of cooperation.

Although we were urged by members of Congress and several of our senior staff to request an extension of the two-year mandate, the determination by the Commission to complete our work within the original two-year period also proved to be a significant stimulant for pushing the work ahead without needless delays.

With the submission of our report to Congress and the President, the Commission disbanded, and activities as a formally constituted body ceased. The Chairman, however, personally continued to pursue the implementation of legislation by working with appropriate Senators and Congressmen. He was frequently called upon by the White House to consult with the senior staff in their efforts to design legislation for submission to Congress. Many

hearings were conducted by various committees of Congress at which the Chairman was invited to testify. He responded to all requests. Other than Congressman Barry M. Goldwater, Jr., none of the other Commissioners played an active role in any of this follow-on effort.

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FOOTNOTES

[1]George T. Sulzner, "The Policy Process and the Uses of National Governmental Study Commissions", Western Political Quarterly, 24 (September, 1971), pp. 438-448.

[2]Thomas R. Wolanin, Presidential Advisory Commissions (University of Wisconsin Press, Madison, 1975).

[3]The Privacy Act of 1974, Public Law 93-579, 93rd Congress, S. 3418, December 31, 1974. "To amend title S, United States Code, by adding a 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes."

[4]Thomas R. Wolanin, op. cit., pp. 13, 138.

[5]The Privacy Act of 1974, op. cit.

[6]Personal Privacy in an Information Society, Report of the Privacy Protection Study Commission (Washington, DC: U.S. Government Printing Office, July 1977).

[7]Frank Popper, The Presidents' Commissions (New York: Twentieth Century Fund, March 1970), pp. 60-61.

[8]Ibid.

[9]Thomas R. Wolanin, op. cit. p. 125.

[10]Ibid.

[11]Ibid., p. 124.

[12]Alan L. Dean, "Ad Hoc Commissions for Policy Formulation?" in Thomas E. Cronin and Sanford D. Greenberg, eds., The Presidential Advisory System (New York: Harper & Row, 1969), pp. 101-116.

[13]Ibid., p. 107.

[14]Frank Popper, op. cit., pp. 57-58.

[15]The Privacy Act of 1974, op. cit.

[16]Thomas R. Wolanin, op. cit., p. 63.

[17]Amitai Etzioni, "Why Task-Force Studies Go Wrong", Wall Street Journal (July 9, 1968), Vol. CLXXII, No. 6, p. 18.

[18]Alan L. Dean, op. cit., p. 113.

[19]Thomas R. Wolanin, op. cit., pp. 102-103.

[20]Personal Privacy in an Information Society, op. cit.

[21]Thomas R. Wolanin, op. cit., p. 138.

[22]Frank Popper, op. cit., p. 6. Popper notes that most commissions are created by Presidential order, not by statute.

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NOTE: The Commission that is the subject of this paper has been widely referred to by several names: Privacy Protection Study Commission; U.S. Privacy Protection Commission; Linowes Commission; Privacy Commission; PPSC.